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CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 18

THE UNITED STATES OF AMERICA,
Appellant,
vs.
THE CRESCENT AMUSEMENT COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

MOTION TO DISMISS AND STATEMENT OPPOSING JURISDICTION

WILLIAM WALLER,
GEO. H. ARMISTEAD, JR.,
D. M. LANSDEN,
Counsel for Appellees.

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IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Civil Action No. 54

UNITED STATES OF AMERICA

v.

THE CRESCENT AMUSEMENT COMPANY, ET AL.

MOTION TO DISMISS PLAINTIFF'S APPEAL

The Crescent Amusement Company, Cumberland Amusement Company, Lyric Amusement Company, Inc., Rockwood Amusements, Inc., Cherokee Amusements, Inc., Kentucky Amusement Company, Inc., Anthony Sudekum and Kermit C. Stengel, move the Court to dismiss the appeal of the plaintiff filed on October 27, 1943, on the grounds (1) that the Court had no jurisdiction to grant the appeal, and (2) plaintiff's appeal does not raise a substantial question.

The grounds of the foregoing motion to dismiss are more fully stated in the accompanying statement opposing jurisdiction on appeal.

[Signed] WILLIAM WALLER,
GEO. H. ARMISTEAD, JR.,
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Attorneys for Defendants,
Address: American Trust Bldg.,
Nashville, Tenn.

A copy of this motion is received and accepted this November 5, 1943.

[Signed] HORACE FRIERSON,
United States District Attorney for the Middle District of Tennessee.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

Civil Action No. 54

UNITED STATES OF AMERICA

vs.

THE CRESCENT AMUSEMENT COMPANY, ET AL.

STATEMENT OPPOSING JURISDICTION ON APPEAL BY THE PLAINTIFF TO REVIEW THE JUDGMENT OF THE DISTRICT COURT.

The final decree in this case was entered on May 17, 1943, and the defendants made timely motions to amend the findings and conclusions in a substantal way, viz., the motions if granted in full would have required substantial changes in the decree. Without awaiting the action of the Court on these motions, plaintiff prayed for and was allowed an appeal on July 16, 1943, and citation was duly issued and served on the defendants. Defendants promptly filed a motion to dismiss the appeal as premature, relying upon the case of *Lieshman* v. *Associated Wholesale Electric Co.*, decided February 15, 1943, 318 U. S. —, 87 L. Ed. 495, 63 S. Ct. 543. Thereafter on August 30, 1943, the Court filed amended findings and conclusions but did not modify the decree. Defendants' motion to dismiss the appeal has not been acted upon and the appeal has not been abandoned by the plaintiff but has been kept alive by orders extending the time for filing the record in the Supreme Court.

On October 27, 1943, plaintiff filed a second appeal.

Defendants take the position that since the first appeal had not been dismissed or abandoned after having been granted by the District Court, and after citation on appeal had issued, the District Court lost jurisdiction to take further steps in the cause, such as the granting of a second appeal. *In re McLean Store Fixtures Corp.*, 70 F. (2d) 217; *Draper* v. *Davis*, 102 U. S. 370, 26 L. Ed. 121; *Ensminger* v. *Powers and Wife*, 108 U. S. 292.

We do not think that the case of *Ohio Public Service Co.* v. *Ohio Ex Rel Fritz*, 274 U. S. 12, is determinative. In that case two writs of error were sued out at different times. The first one was issued while an application for rehearing was pending, and the second after the petition had been acted upon and denied. The Court held that plaintiff in error might rely upon the latter writ and that the first one would be dismissed. The opinion does not show whether or not the first writ was properly prosecuted, and as the facts in the opinion concerning same are so meager, we assume that there was some reason why the District Court retained jurisdiction to act upon the petition for rehearing before the actual dismissal of the first writ.

The cases cited above very clearly hold that after an *appeal* has been granted by the District Court and citation issued, the District Court loses jurisdiction until the appeal is dismissed or abandoned.

If incorrect in the foregoing position, defendants urge that the question raised by Plaintiff's appeal is not a substantial one.

It is true that in the findings and conclusions filed August 30, 1943, conclusion No. 20 was to the effect that plaintiff was entitled to an injunction restraining each exhibitor defendant from acquiring a financial interest in additional theatres outside Nashville, except after an affirmative show-

ing that such acquisition will not unreasonably restrain competition. However, the Court filed amended findings and conclusions on August 30, 1943, in which this conclusion was reconsidered and modified. The decree is in accordance with the modified conclusion which is to the effect that each exhibitor defendant may acquire additional theatres if no coercion or predatory practices are used. In other words, if some theatre owner desires to dispose of his theatre, it was the opinion of the Court that the defendant exhibitors should be permitted to negotiate for its purchase.

There is nothing in the Court's decision to the effect that the mere acquisition of additional theatres is or can be illegal in and of itself. The Court, however, concluded that it is illegal to acquire a theatre from someone else by a threat, express or implied, that a competing theatre will be opened. This being the decision of the Court, the injunctive remedy granted is wholly adequate; and it would be outside the scope of the decision to require the Court to pass upon the acquisition of other theatres where the sale is purely voluntary. How could it "unreasonably restrain competition" for one of the exhibitor defendants to purchase a theatre, which is a non-competing theatre, from some owner who "for business reasons of his own" wishes to sell it? If such an injunction is appropriate in the case at bar, it would be appropriate in the case of every small independent chain of theatres in the United States, and would simply mean that the District Courts of the country would be giving approval or disapproval to transactions of an ordinary business nature without any rule or standard to guide them. While it would appear from the statement of jurisdiction filed by plaintiff that the idea is to prevent defendant exhibitors from purchasing competing theatres, the assignments of error contain no such

limitation and the decree presented to the Court by pl
tiff contains no such limitation.

Respectfully submitted,

[Signed] WILLIAM WALLER,
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A copy of the above statement opposing jurisdictio
received and accepted this November 5, 1943.

[Signed] HORACE FRIERSON,
United States District Attorney for
the Middle District of Tennesse